Villanova University School of Law
School of Law Working Paper Series

Year 2007 *Paper* 78

Harmonizing Plural Societies: The Cases of Lasallians, Families, Schools – and the Poor

Patrick McKinley Brennan*

*Villanova University School of Law, brennan@law.villanova.edu

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

http://law.bepress.com/villanovalwps/art78

Copyright ©2007 by the author.

Harmonizing Plural Societies: The Cases of Lasallians, Families, Schools – and the Poor

Patrick McKinley Brennan

Abstract

The modern state characteristically assumes or asserts a monopoly over "group persons" and their right to exist; group persons are said to exist at the pleasure or concession of the state. According to Catholic social teaching, by contrast, these unities of order – such as church and family, as well as corporations and schools and the like – are, at least in potency, ontologically prior to the state. Such group persons both constitute conditions of the possibility of human flourishing and, correlatively, impose limitations on the "sovereign" state. Such group persons are not mere concessions of an unbounded state: They are ontological realities that must be recognized by the state and, as necessary or apt, regulated or assisted according to the principle of subsidiarity, properly understood.

This Article studies how the current failure in the United States to respect both the reality of group persons and the proper application to them of the principle of subsidiarity frustrates the work of families and churches in the concrete conditions of America today. In particular, the Article demonstrates how the Lasallian order, which for centuries has served the poor through education, has lost its ability to continue that work in the U.S. today. Law and policy shaped by respect for group persons and the principle of subsidiarity could, without violating the Establishment Clause as currently authoritatively interpreted, come to the rescue of family, church, and poor children. Catholic social doctrine points toward a limited state that serves not just individuals, including individuals in poverty, but the societies in which individuals reach the ontological perfections of which they are capable.

HARMONIZING PLURAL SOCIETIES: THE CASE OF LASALLIANS, FAMILIES, SCHOOLS—AND THE POOR

PATRICK MCKINLEY BRENNAN†

"*[I]s the life of the society to be conceived as inherent or derived? Does the Church exist by some living force, with powers of self-development like a person; or is she a mere aggregate, a fortuitous concourse of ecclesiastical atoms, treated it may be as one for purposes of convenience, but with no real claim to a mind or will of her own, except so far as the civil power sees to invest her for the nonce with a fiction of unity*?"[1]

"*By reason of its identity, therefore, the Catholic school is a place of ecclesial experience, which is moulded in the Christian community. However, it should not be forgotten that the school fulfils its vocation to be a genuine experience of the Church only if*

---

† John F. Scarpa Chair in Catholic Legal Studies and Professor of Law, Villanova University School of Law. The germ of this paper was the author's keynote address at the marvelous June 2005 conference on "school choice" that was sponsored by the Brothers of the Christian Schools at Mont La Salle, Napa. For their kind invitation and gracious hospitality, I am grateful to all of the Brothers, especially Brother Stanislaus, as well as to their collaborators Jack Coons and Tom Brady. For their penetrating comments on that occasion, I am grateful to Jesse Choper, Steve Sugarman, and Michael Guerra. I am also grateful to Brothers Edmond LaRouche, Michael McGinnis, Joseph Grabenstein, and George Van Grieken for help of various kinds in connection with my preparation of this paper. A special debt runs to Russell Hittinger; as the documentation herein attests, his work on the history of modern Catholic social thought has had a unique role in opening my eyes to new questions and directions. My thanks are also due to members of the audiences at St. John's University School of Law and the University of St. Thomas School of Law in Minnesota where I presented versions of this paper in the Spring of 2006; the comments of Susan Stabile, Larry Winer, and Nelson Tebbe at St. John's, and Elizabeth Schiltz, Thomas Mengler, Charles Reid, and Greg Sisk at St. Thomas were especially helpful. I dedicate this paper to Brother R. Columban, F.S.C. At 92 years of age, he remains a Brothers' Brother, full of love for the Church, the Institute, youths of every background, and, above all, the Lord whom he serves in joy.

[1] JOHN NEVILLE FIGGIS, CHURCHES IN THE MODERN STATE 40 (Thoemmes Press 1997) (1914).

it takes its stand within the organic pastoral work of the Christian community. . . . In the life of the Church, the Catholic school is recognised above all as an expression of those Religious Institutes which, according to their proper charism or specific apostolate, have dedicated themselves generously to education."[2]

INTRODUCTION: AFTER *MUNERA*

The current system of support and supervision of primary and secondary schools across the United States is grossly out of line with primary principles of Catholic social thought. More specifically, the American educational apparatus stands square in the way of non-rich families fulfilling their *mission* and, coordinately, of the Church's fulfilling hers. These are the principal claims for which I shall argue here, and I shall do so from the angle of a concrete work of the Catholic Church in the United States today. It was the foundering of this particular work that concentrated my attention on how families and schools disappear in the sea that dissolves societies or, in a more technical idiom, *group persons*. "One of the mottoes of modern absolutism," F.W. Maitland observed, has been that "the absolute State face[s] the absolute individual."[3] The Church, however, joins Maitland in reminding the absolutizing state that "[g]roup-personality is no purely legal phenomenon."[4]

Rather than on group-personality, recent literature developing the implications of Catholic social thought for education reform in the U.S. has tended to focus on the principle of subsidiarity.[5] Subsidiarity in turn has frequently been understood, in the education-reform debate as elsewhere, as a

[2] PREFECT PIO CARD. LAGHI & ARCHBISHOP JOSÉ SARAIVA MARTINS, CIRCULAR LETTER OF THE CONGREGATION FOR CATHOLIC EDUC. *THE CATHOLIC SCHOOL ON THE THRESHOLD OF THE THIRD MILLENNIUM* ¶¶ 12–13 (1997), *available at* http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_27041998_school2000_en.html.

[3] F. W. MAITLAND, STATE, TRUST AND CORPORATION 66 (David Runciman & Magnus Ryan eds., 2003).

[4] *Id.* at 68.

[5] *See, e.g.*, Richard W. Garnett, *The Right Questions About School Choice: Education, Religious Freedom, and the Common Good*, 23 CARDOZO L. REV. 1281, 1305–07 (2002); Michael P. Moreland, *Subsidiarity, Localism, and School Finance*, 2 J. OF CATH. SOC. THOUGHT 369, 369–70, 397–400 (2005); *see also* JOHN PAUL II, PAPAL LETTER *LETTER TO FAMILIES* ¶ 16 (1994) (urging that the "mission of education . . . always be carried out in accordance with a proper application of the *principle of subsidiarity*").

directive toward devolution of power and responsibility from the state to the smallest group that is capable of performing a specific task.[6] A mandate for divestiture from above, subsidiarity is celebrated as a check on the monopolistic tendencies of the modern state; it is a plea for localism and doing things at the lowest possible level.[7]

The usually unspoken assumption of such subsidiarity analysis seems to be that (legitimate) power starts at the top and is allowed (or not allowed) to trickle down, based on someone's or a hegemonic group's cost-benefit analysis; the power that decends does so with no given specific, necessary destination.[8] In such a tractionless environment, subsidiarity is malleable and easily manipulated, and therefore unthreatening to all but the biggest consolidators of power.[9] In the eyes of Catholic social thought,

---

[6] *See, e.g.*, ANTHONY S. BRYK, VALERIE E. LEE & PETER B. HOLLAND, CATHOLIC SCHOOLS AND THE COMMON GOOD 45 (1993); TRACEY ROWLAND, CULTURE AND THE THOMIST TRADITION: AFTER VATICAN II 61 (2005) (describing "the traditional principle 'subsidiarity,' according to which decision-making authority should be decentralized to the lowest level at which the decision can competently be made"); Lucia A. Silecchia, *Catholic Social Teaching and Its Impact on American Law: Some Observations on the Past and Reflections on the Futur*e, 1 J. OF CATH. SOC. THOUGHT 277, 301 (2004) ("[T]he Church preaches the principle of subsidiarity, consistently teaching that problems should be resolved at the lowest level capable of effectively doing so."); *cf.* Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103, 116 (2001) [hereinafter Vischer, *Principle of Governance*] ("Subsidiarity is not a knee-jerk shunning of government authority . . . . Rather, subsidiarity is a principled tendency toward solving problems at the local level and empowering individuals, families and voluntary associations to act more efficaciously in their own lives. In this regard, the focus is on fostering the vitality of mediating structures in society."). For the reasons developed *infra* text at notes 127–34, subsidiarity, as understood in Catholic social teaching, does not "empower;" rather, at least some of the time, it recognizes and gives effect to an anterior distribution of ruling power.

[7] *See* BRYK ET AL., *supra* note 6, at 45, 301–02; Vischer, *Principle of Governance*, *supra* note 6, at 122–23.

[8] *Cf.* Russell Hittinger, *Social Pluralism and Subsidiarity in Catholic Social Doctrine*, PROVIDENCE: STUDIES IN WESTERN CIVILIZATION, at 59 (2002) [hereinafter Hittinger, *Social Pluralism*] ("In papal teachings since Pius XI, subsidiarity is proposed as a principle of non-absorption, not a principle that necessarily requires devolution. As it is commonly understood, *devolution* is the opposite of subsidiarity. For devolution presupposes either: (a) an ontological deficiency, measured by a kind of cost-benefit analysis, or (b) that the central government rightly possesses a plenary power that it has now decided to redistribute to other powers and authorities.").

[9] *See* Moreland, *supra* note 5, at 369 ("A recurring theme in the literature on subsidiarity is that the principle of subsidiarity is indeterminate, vague, and ultimately unhelpful to the resolution of concrete legal and policy questions . . . . The church's own teaching documents contribute to this apparent uncertainty by

however, subsidiarity does not govern—even if, *per impossibile*, it could do such a thing—devolution of power from a top, central *locus*.

Rather, subsidiarity governs relations in a world in which ruling power has already been, at least in part, distributed in *munera*. The defect of the typical subsidiarity analysis is that it slights or denies subsidiarity's necessary predicate or correlate, the *munus*. The Latin word *munus*, of which the plural is *munera*, is translated variously as function, gift, vocation, or mission.[10] To recognize *munera* is to recognize that specific functions have been (or should be) assigned to specific individuals or specific societies. One can safely speculate that the cause of the submersion of the concept of *munus*, or at least part of that cause, is its irremediably pre-modern claims. The Second Vatican Council, however, used the word *munus* at least 248 times, and the *Catechism of the Catholic Church* (1997) and the *Code of Canon Law* (1983) have continued apace.[11]

A semi-technical exposition of *munera* will be necessary, but we can begin by observing that it has been a central thesis of the *philosophia perennis* that every natural kind has a given "function" or (in Greek) *ergon*. In the words of Aristotle, early in the *Nicomachean Ethics*,

> Have the carpenter, then, and the tanner certain functions or activities, and has man none? Is he born without a function? Or as eye, hand, foot, and in general each of the parts evidently has a function, may one lay it down that man similarly has a function apart from all these? What then can this be?[12]

Aristotle follows this series of questions with a dialectic from which he famously concludes that the function of man is an activity of the soul according to a rational principle[13]—a thesis

speaking of subsidiarity as counseling devolution of authority in some circumstances but centralization of authority in others.").

[10] THE POCKET OXFORD LATIN DICTIONARY 87 (James Morwood ed., Oxford Univ. Press 1994).

[11] Hittinger, *Social Pluralism*, *supra* note 8, at 55.

[12] THE NICOMACHEAN ETHICS OF ARISTOTLE 13, I.7 1097b29 33 (Sir David Ross trans., 1925).

[13] *See id.* at 13–14, I.7 1097a33, 1098a29. While Aristotle's central thesis is clear, much of the important detail is controverted. *See, e.g.*, H. H. JOACHIM, ARISTOTLE: THE NICOMACHEAN ETHICS 50 (1951); RICHARD KRAUT, ARISTOTLE ON THE HUMAN GOOD 312–57 (1989) (expanding on Aristotle's function argument and considering it in a larger context); Richard Kraut, *The Peculiar Function of Human Beings*, 9 CAN. J. OF PHIL. 467, 467–78 (1979) (questioning and clarifying Aristotle's

that Thomas Aquinas took up and, as they say, baptized. In the words of the twentieth-century Thomist Jacques Maritain (1882–1973), the natural law of every natural kind is its "normality of functioning."[14]

To the classical thesis on the function of natural kinds, modern philosophy has not been kind—and the case is *a fortiori* with respect to the related thesis that human *societies* or "group persons," not just individuals or parts thereof, come bearing functions.

The Catholic Church, however, continues to teach—indeed, has clarified and magnified her teaching—that not only individual persons, but also human *societies* or "group persons" bear distinct functions. As Russell Hittinger has shown, the Church over the last century has developed her teaching on human functionality, through a new a focus on and amplification of the concept of *munus*.[15] Professor Hittinger opines that "the idea of *munus* holds together the Aristotelian notion of *ergon* or characteristic function with the more biblical concept of vocation or mission."[16] In refining the function thesis, the Church has been responding to the uniquely modern claim that both human individuals and human societies lack *munera* altogether.[17] In a world without *munera*, anything goes and nothing is required. By denying the existence of mandatory *munera* that precede creation by the state, the totalitarian regimes of the twentieth century robbed the basic human societies of their legal personality, and having denied their *right* to exist, frequently denied them *opportunity* to exist. In a world that respects *munera*, as the Popes have reminded the world, individuals and groups have work to do and gifts to exchange.

Although it *conceals* a totalitarian face, the contemporary American educational apparatus is ruthless in its pitting of the individual—or, rather, some individuals—against the putatively sovereign state. Rich and middle-class families are at liberty to transport their lucky children whithersoever they choose, but the rest, people of low income and the poor, are compelled to meet

passage on the function of human beings).

[14] JACQUES MARITAIN, MAN AND THE STATE 87 (1951).

[15] *See* Hittinger, *Social Pluralism*, *supra* note 8, at 54–63.

[16] *Id.* at 57.

[17] *See id.* at 52–54.

the state face to face in the confines of the neighborhood school.[18] Unlucky parents and children must take whatever the state serves up in terms of education, no matter the violence to the integrity of the family and its firmly held convictions.[19] An educational apparatus that respected *munera* would allow the family, and other implicated societies such as church and school, to fulfill their respective functions, including education into the truth as understood by family and church.

My own thinking on these questions has been concentrated, as I mentioned, by a particular work, that of the Institute of the Brothers of the Christian Schools. More commonly known today as the De La Salle Christian Brothers, after their founder St. John Baptist de La Salle (1651–1717), they were my teachers and mentors when I was growing up in California. The germ of the present paper grew out of the Brothers' welcome invitation to join a team assembled to consider some of the challenges and opportunities the Brothers face today. The Brothers' concrete *munus* focused my considerations; conditions that might yet allow it to be fulfilled are my concern. There is risk that the narrative the Brothers made available to generations of youngsters may soon have run its course in the United States.

Thriving throughout much of the world until a generation ago, not least in the U.S., the Institute that La Salle founded in France in 1680 is facing possible extinction in this country. Although many (though by no means most) of the schools the Brothers built in the U.S. remain open today, they are staffed and administered almost exclusively by dedicated lay men and women. La Salle's Institute is disappearing before our eyes. Not a soul entered the Brothers' one remaining U.S. novitiate in 2005, and the novitiate class of 2004 ended with just two members. Such numbers (of which zero is more common than two) have come to be expected, and there is no terrestrial reason to anticipate abrupt reversal. The Brother Archivist at La Salle University (Philadelphia) reports that whereas there were 2,995 Brothers in the United States in 1965, today there are just 816. Many among those 816 are over sixty years-old. The Brothers' retirement communities swell to overflowing, as the active

[18] JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 11–12 (1999).

[19] *See id.* at 11 (noting that children from poor backgrounds have fewer educational options than children from more comfortable backgrounds).

communities dwindle and close. The result is that within a generation or two, the United States could find itself without the historically robust service of the Catholic Church's largest congregation of men devoted exclusively to teaching, and to teaching youth specifically.

The passing of the Brothers takes on a special salience from the fact that the Brothers have dedicated themselves and their efforts, from the moment La Salle set to work, to "service of the poor through education." Many individuals and societies in the Church serve the poor, and many serve as educators. *To serve poor children through Christian education*, this was La Salle's enduring, and radiating, innovation; it is the Brothers' distinctive *munus*.

But yes, a thousand times yes: Today and in recent history, the Brothers in the U.S. have been serving mostly middle-class and rich children. La Salle himself insisted that the Brothers' teaching be free, and, until a generation or two ago, the Brothers in the U.S. were able to provide comparatively inexpensive education, as well as ample scholarships for those in need of them, thanks in part to the Brothers not collecting salaries.[20] The Brothers' vowed poverty served the needs of children who happened to be poor.

The shifting cultural and specifically economic realities of today, however, have meant that schools that used to be widely affordable increasingly are accessible only to the well-off.[21] Lay teachers deserve a living wage. Lasallians have struggled mightily to keep their schools accessible to poor and low-income families, but, notwithstanding some impressive support from benefactors, more and more poor children are unreachable by those who have ardently sought to serve them.

No doubt, there are many and interrelated causes of their shrinking numbers in the U.S. The bald and sad fact, however, is that the Lasallians are losing ground in their fight to serve the poor through education, because, increasingly, they cannot *afford* to provide education to poor and low-income families. And when

[20] In some places, including the one I was blessed to know as a child, the Brothers subsidized their schools through the manufacture and sale of wine and spirits.

[21] *See* Valerie Strauss, *$26,000 Cost Pushes Up Barriers to Area Private Schools*, WASH. POST, Apr. 3, 2006, at A1 (describing how rising tuition costs are putting private schools out of reach for poor and middle-class children).

an Institute can no longer do the work that is its to perform, who in his right mind would feel a divine call to join in such work? The shortage of Brothers and the Brothers' inability to do their work combine to cause each other. The result is that at a time when America's poor children are more desperate than ever for worthy education, some of poor children's most ardent advocates in the United States are going the way of the Passenger Pigeon, and, at least in part, for systemic reasons of which the Brothers are innocent. Sadly but not inevitably, American social and legal soil does not nourish the Lasallians' particular *munus*, service of the poor through education.

The interlocking luck of wealth, location, and property taxes results, under our current education dispensation, in the conscription of low-income children by local public schools. There do remain the exceptional cases in which scholarships deliver poor children to schools of their parents' choosing, but the legally-sanctioned situation renders poor and low-income parents unable to make educational choices that rich people make every day. Much of the "Catholic" literature on school choice takes the family, or occasionally the "preferential option for the poor," as a starting point. The different, though largely complementary and certainly broader, angle pursued here concerns not just the family or distributive justice, but the freedom of expansion of group persons, including the Institute of the Brothers of the Christian Schools and their particular schools. Thought and practice that fail to respect the plural *munera* of distinct societies lead inexorably to the atomized world in which individuals, and poor people especially, face the monolithic state one by one.

If, instead, we respect these societies for what they are and can be, then the question we must go on to ask is *how to support and coordinate the plural munera of plural societies*. The pluralist must face the issues the totalizer would bowdlerize. Although *direct* aid to religious societies, such as the Brothers or their schools, is out of the question in the U.S. today, aid to families, who can then enlist the services of religious societies, *is*, to the extent the rule of *Zelman v. Simmons-Harris*[22] holds, a possibility. *Zelman* is a development and application of the principle of *Pierce v. Society of Sisters*,[23] according to which

[22] 536 U.S. 639, 652 (2002).
[23] 268 U.S. 510 (1925).

principle the state may not "unreasonably interfer[e] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[24]

This paper comprises five parts. Part I develops the particular *munus* that is the Brothers'. Some readers may prefer to skip ahead to Part II and come at once to my argument about *munera*, societies, and subsidiarity *in general*. An intellectual advantage to a prior immersion in the Brothers' *munus* is that it brings into relief a fact frequently elided in our American discourse: the individual-versus-the-state model, to which we are becoming inured, damages not just the family, but also other institutions vital to the good of civil society and, yes, the Church in all her members. Part of the legitimate state's responsibility is to contribute to group-persons' satisfaction of their respective *munera*. These conditions are neglected at our common peril, though—and this is the crux of the matter—frequently without many people's quite noticing. As Professor Joseph Viteritti has observed,

> If there is any danger inherent in the relationship between religious institutions and government that pertains in the United States, it has little to do with the eventuality of an established church. Our great risk arises from the fact that because so few Americans live their lives according to the strict dictates of their faith, the majority of us do not appreciate the strength of the moral obligations that compel devout observers. We need to be reminded that such people exist, and that it was for their sake that the First Amendment was written. We should not expect them to accept the secularist ethos that most Americans are comfortable with, or to do deal with their faith on the same terms that the rest of us do.[25]

"Such people" include the Lasallians with devout desire to the work of the Church for the poor. Who can justify the systemic frustration of the Lasallians' zeal to do their corporate religious work for the good of the Church and God's children, especially the poor, for the good of families, and for the common good? Neglect overtakes justification, and here we are: Group persons are simply occluded, their *munera* ignored.

---

[24] *Id.* at 534–35. The "principle" of *Pierce* was "reaffirm[ed]" in *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). Also see *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

[25] VITERITTI, *supra* note 18, at 208.

In Part II, I develop and analyze the concept of "society" or 'group person,' the social significance of societies' respective *munera*, and, finally, the content of subsidiarity in a world that respects group persons and their respective *munera*. In sum, the Catholic expectation is one of plural societies, with their respective authorities, harmonized by appropriate *subsidium*. Returning to schools and families, I summarize in Part III the Catholic position with respect to locating and sharing responsibility for education. It is the *munus* of the family to be the primary provider of education of its children, though frequently it will require help in meeting this mission. In Part IV, I measure aspects of my thesis against recent work on school choice and subsidiarity, arguing that Catholic social thought, as developed earlier in the paper, allows us to "take *Pierce* seriously," but requires us also to reject an understanding of subsidiarity that prefers in-principle "value pluralism" to respect for the *munera* granted by creation and redemption. Admittedly, there is an element of wheel-reinvention to all of this. Already in his 1939 encyclical *Divini Illius Magistri*, Pope Pius XI (citing and quoting the *Pierce* case!) said this:

> It must be borne in mind also that the obligation of the family to bring up children, includes not only religious and moral education, but physical and civic education as well, principally in so far as it touches upon religion and morality.
>
> This incontestable right of the family has at various times been recognized by nations anxious to respect the natural law in their civil enactments. Thus, to give one recent example, the Supreme Court of the United States of America, in a decision on an important controversy, declared that it is not in the competence of the State to fix any uniform standard of education by forcing children to receive instruction exclusively in public schools, and it bases its decision on the natural law: the child is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty, to educate him and prepare him for the fulfilment of his obligations.[26]

I. THE LASALLIAN *MUNUS* AND MINISTRY

The characteristic Lasallian contribution is the one made in

[26] PIUS XI, ENCYCLICAL LETTER *DIVINI ILLIUS MAGISTRI* ¶¶ 36–37 (1939) [hereinafter *DIVINI ILLIUS MAGISTRI*].

the quiet obscurity of the classroom—but, as already indicated, not just any classroom, for any old reason. The insight on the basis of which the Lasallians above all can enrich today's world is the one Jacques Maritain attributed to St. La Salle in these beautifully stark terms: "this priest of heroic self-devotion and profound spirituality had the deep insight that the poor have a *right to education*, which was synonymous for him—and remains synonymous for his sons—with Christian education."[27] Some three centuries before both the United Nations' 1959 *Declaration on the Rights of the Child* and the Second Vatican Council's echo of that U.N. declaration in its own 1965 *Declaration on Christian Education* (*Gravissimum Educationis*), John Baptist de La Salle declared the right and sought, through the work of his Institute, to satisfy it. This is the core of La Salle's spiritual patrimony; service to the poor through education is the Institute's *munus*.

But what of the fact that today's world differs in so many respects from the world LaSalle faced? The world has changed; how should the Brothers change? As Brother George Van Grieken, F.S.C., observes in *Touching the Hearts of Students: Characteristics of Lasallian Schools*: "To do justice to De La Salle's charism in the contemporary world, one must do justice both to the nature of that charism and to the nature of the contemporary world, placing them in critical dialogue with each other."[28] We can begin this dialogue by inquiring how those who claim La Salle, whom Pope Pius XII in 1950 named "Patron of All Teachers of Youth," as their inspiration should shape themselves and their work in this world of ours that is so different from any that has been seen before. How ought the Brothers respond to and work within a legal culture that denies the conditions necessary to satisfaction of their *munus*? As Jacques Maritain said to the Brothers in 1951, on the occasion of the tercentenary celebration of La Salle's birth, "genuine spiritual faithfulness is free from merely material attachment to custom, even venerable, and that in circumstances basically different the same spirit and the same aims must be served by different methods of

[27] Jacques Maritain, Manhattan College Address (Apr. 30, 1951), *available at* http://www2.nd.edu/Departments//Maritain/jm315.htm (emphasis added) (original emphasis omitted).

[28] GEORGE VAN GRIEKEN, TOUCHING THE HEARTS OF STUDENTS: CHARACTERISTICS OF LASALLIAN SCHOOLS 121 (1999).

application."[29] If Maritain is right that no blind adherence to old ways of doing things can go unchallenged, he is also right that nothing short of *genuine spiritual faithfulness* will do. The spiritual bequest of La Salle is a gift to the whole Church, but it remains the special trust of the Brothers of the Christian Schools, as Brother Luke Salm, F.S.C., acknowledges, while also sounding a word of warning:

> The spiritual vision of De La Salle could never have survived to enrich future generations of Brothers, students and colleagues, if the community had not achieved institutional form. Its formally approved and clearly defined juridical character is a necessary and important guarantee that the legacy of De La Salle will have stability and permanence, that the spirituality and the charism of the Founder can be kept alive, developed, and transmitted from one generation to the next. Thus it is the Institute itself that constitutes the total legacy of John Baptist de La Salle.[30]

The Brothers are fewer and fewer, but, as long as it lasts, the Institute that comprises them retains its distinct *munus* in the life of the Church and the world she serves, a function growing out of La Salle's unique charism and vision. The *munus* of the Lasallians cannot be altogether "outsourced."[31] Their

---

[29] Maritain, *supra* note 27.

[30] LUKE SALM, F.S.C., THE WORK IS YOURS: THE LIFE OF SAINT JOHN BAPTIST DE LA SALLE 203 (2d ed. 1996).

[31] Many Catholic orders are in decline, of course, but the Brothers, like so many other lay congregations, have fared far worse than most of the venerable clerical orders. Without Holy Orders and a sacramental ministry as ballast and direction, the Brothers, especially in the U.S., have been hurtling toward dissolution. But will the disappearance of the Brothers spell the end of the Lasallian story in the U.S.? Perhaps, but not *necessarily*.

Today's Brothers have resolved and undertaken to preserve the spiritual and some of the institutional legacy of La Salle. They are attempting to do this by entering into "partnership" with lay men and women in the work that was once the Brothers' alone. What used to be Brothers' schools—schools staffed exclusively (or predominantly) by Brothers and led by a Brother—are being succeeded by "Lasallian schools"—schools staffed and led by dedicated lay people in cooperation with a handful of Brothers whose new work it is to imbue their partners with the essentials of Lasallian spirituality and pedagogy.

We can ask whether it would make sense to speak of Lasallian schools if *no* Christian Brothers were *anywhere* to be found, but this is a question we need not face, at least not yet. And though we can brood over the notorious impossibility and collateral costs of "institutionalizing" charism, at the same time we should hope that the special gift of St. La Salle to the Church and the world will not evaporate in proportion to the number of Brothers who continue to live by the Saint's Rule. We cannot predict the results of the Brothers' and their Partners' current efforts, but, in

characteristic function is—or should be—what is supported and sought, as it is irreducibly theirs.

This point made by Brothers, and made to the Brothers by Maritain, is made more generally by the Church, and in particular in the authoritative teaching of the Second Vatican Council in its norms for the renewal of the religious life. There has been a tendency on the part of some since Vatican II to "explor[e] now this and now that new possibility."[32] What the Church asks of religious societies or institutes is *fidelity to their proper munera*:

> It is for the good of the Church that institutes have their own proper character and functions [*munera*]. Therefore the spirit and aims of each founder should be faithfully accepted and retained, as indeed should each institute's sound traditions, for all of these constitute the patrimony of an institute. . . . All institutes should share in the life of the Church. They should make their own and should foster to the best of their ability, in a manner consonant with their own natures, its initiatives and undertakings . . . .[33]

As today the Brothers renew their Institute and its work through re-appropriation of the spirit and aims of St. La Salle, trying (what Maritain referred to as) "different methods of application,"[34] the Church bids them preserve their *munus* of serving the poor through education. This is the task that is properly their own, from their Founder and from the universal Church. Vatican II adds that, in reforming their approach to their respective *munera*, the active orders and institutes must continue to be missionary in vision and aims:

> Institutes should faithfully maintain and accomplish the tasks that are theirs . . . . The missionary spirit must, absolutely, be

aid of them, we can join with the Lasallians in discerning the place of, and making way for, the Lasallian schools of the future. As the Lasallians plumb St. La Salle's spiritual patrimony for what it can speak to us today, we can assist by meeting them in dialogue about this world of ours that needs the Lasallian contribution. *Cf.* VAN GRIEKEN, *supra* note 28, at 13–21.

[32] BERNARD LONERGAN, *Dimensions of Meaning*, *in* 4 COLLECTION: COLLECTED WORKS OF BERNARD LONERGAN 245 (Frederick E. Crowe & Robert M. Doran eds., 1988).

[33] VATICAN II, DECREE ON THE UP-TO-DATE RENEWAL OF RELIGIOUS LIFE: *PERFECTAE CARITATIS* ¶ 2 (Oct. 28, 1965), *reprinted in* VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS 611, 612 (Austin Flannery ed., 1998) (1975) [hereinafter *PERFECTAE CARITATIS*].

[34] Maritain, *supra* note 27.

> preserved in religious institutes and must be adapted to modern conditions, in keeping with the character of each, so that the preaching of the Gospel to all nations may be more effective.[35]

This is the renewal—the "genuine spiritual faithfulness"—to which the Church calls that part of herself that is the Institute of the Brothers of Christian Schools.

Genuine spiritual faithfulness will require, furthermore, fidelity to LaSalle's particular conception of the purpose of education. For Lasallians the quotidian deeds of education have the eternal salvation of the pupils as their final cause.

> God wills not only that all come to the knowledge of the truth but also that all be saved . . . . He cannot truly desire this end without providing the means for it and, therefore, without giving children teachers who will assist them in the fulfillment of this plan. . . .
>
> Therefore, you must honor your ministry and keep trying to save some of these children.[36]

The quoted language comes from La Salle's *Meditations for the Time of Retreat*, and the scriptural text on which he is meditating is, of course, *I Timothy* 2:4: "God desires that all men be saved and to come to knowledge of the truth."[37] Hans Urs von Balthasar and others have wondered whether we can dare hope that all humans be saved.[38] John Baptist de la Salle made God's expressed desire that all his children be saved and come to knowledge of the truth a principle of action, the precept of a new *ministry*.

Some today warm to Lasallians for their historical commitment to serve the poor, and would edit out those elements of the Saint's work that concern salvation and coming to knowledge of the truth. Much of the crusade to relativize "Christian education" cathects the moral need to respect the individual conscience. Such unbalanced focus on "the right to liberty of conscience" can obscure the fact that the authentic right springs, as the Second Vatican Council taught in the *Declaration on Religious Liberty (Dignitatis Humanae)* from the universal human duty "to seek the truth, especially religious

---

[35] *PERFECTAE CARITATIS*, *supra* note 33, ¶ 20.

[36] JOHN BAPTIST DE LA SALLE: THE SPIRITUALITY OF CHRISTIAN EDUCATION 39 (Carl Koch et al. eds., 2004) [hereinafter KOCH].

[37] *I Timothy* 2:4.

[38] *See generally* HANS URS VON BALTHASAR, DARE WE HOPE "THAT ALL MEN BE SAVED?", (David Kipp & Lothar Krauth eds., 1988).

truth," and that, furthermore, "[all people] are also bound to adhere to the truth once they come to know it and direct their whole lives in accordance with the demands of truth."[39] No one today can say in the name of the Church that anyone should be forced to embrace the Catholic faith in violation of his own conscience. Correlatively, Catholics must affirm that no effort can be spared in helping people freely to inform their conscience according to that truth in which salvation lies. The work initiated by La Salle simply loses its *raison d'etre* if the exigence to bring children to salvation and knowledge of the truth is overlooked or, God forbid, denied.

La Salle conceived of this work of the Brothers—bringing children to salvation and knowledge of the truth--as exactly what he called it: ministry. Though himself a priest, La Salle founded a *lay* movement. Like members of most other modern orders and institutes, the Brothers take vows of poverty, chastity, and obedience, but they are not called to Holy Orders. All members of La Salle's Institute pursue a properly *lay* ministry, rather than a sacramental ministry. In the words of one contemporary scholar, Brother Michael McGinnis, F.S.C.:

> "[La Salle's] determined insistence on the lay character of the society did not emerge from an a priori position about the relationships of clergy and laity (such a one could develop in contemporary theology and practice) but rather from pursuing particular commitments to which the events of his life had directed him."[40]

Those commitments included serving the neglected poor through education. Education, as conceived of by the Saint, however, was not the classical education of—say—the Ratio Studiorum, nor was it, as we post-moderns might imagine, about getting "information" across to incipient utility-maximizers. La Salle was conspicuously concerned about developing practical skills in the Brothers' disciples (as the Saint liked to refer to their pupils), about teaching those disciples manners and modes of conduct and deportment in a way that would call their own human dignity to their attention, and about their disciples' learning

[39] *See generally* VATICAN II, DECLARATION ON RELIGIOUS LIBERTY: *DIGNITATIS HUMANAE* ¶ 2 (Dec. 7, 1965), *reprinted in* VATICAN COUNCIL II, *supra* note 33, at 799–800 [hereinafter *DIGNITATIS HUMANAE*].

[40] KOCH, *supra* note 36, at 248 n.34 (quoting MICHAEL MCGINNIS, F.S.C., *Church*, *in* LASALLIAN THEMES 83, 90 (1992)).

what they needed to know to get along well in the world. To the mind of La Salle, however, the Brothers' work was emphatically not social work but *ministry*. La Salle and his Brothers rose early and labored late from a devout desire to see that as many as possible might be saved and come to knowledge of the truth. The following are the terms in which La Salle understood the Brothers' work in the Church:

> [Y]ou must honor your ministry and keep trying to save some of these children. (Rom. 11:13-14). Because God has made you his ministers to reconcile them to him, according to the expression of the same apostle, and has entrusted you for this purpose with the word of reconciliation for them, exhort them as if God were urging them through you, for you have been destined to cultivate these young plants (Ps 128:3, 144:12) by announcing the truths of the gospel to them (2 Cor 5:18-20) and to procure for them the means of salvation appropriate to their development.[41]

> God has had the goodness to remedy [the misfortune of children in abject poverty and neglect] by the establishment of the Christian Schools, where the teaching is offered free of charge and entirely for the glory of God, where the children are kept all day to learn reading, writing, and their religion, and where they are always busy, so that when their parents want them to go to work, they are ready for employment.[42]

La Salle clarified and assured the dignity of the work of serving the poor through education and thereby contributed to their salvation, because he never confused or conflated sacramental ministry and the ministry to be performed by his Brothers.

The writings in which La Salle refers to this saving work of the Brothers as "ministry" were considered spirituality and not theology, and therefore they were not scrutinized for their orthodoxy in connection with his canonization in 1900.[43] But it would be a mistake to elide the Saint's teaching about ministry, even if out of a healthy fear of avoiding the wrong side of today's debates about what is and what is not "ministry" in the Church.[44]

---

[41] *See* KOCH, *supra* note 36, at 39.

[42] *See id.* at 40.

[43] *See id.* at 27 (citing MCGINNIS, *supra* note 40, at 89).

[44] *See, e.g.,* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, CO-WORKERS IN THE VINEYARD OF THE LORD 5 (2005) (offering a "pastoral and theological

What stands out for our contemporary edification is La Salle's insight that *the work of basic education—not just the critical task of catechesis—is part of the ministerial work of the whole Church, pursued especially on behalf of the poor by the Institute he founded for that purpose*. "How you ought to consider yourselves honored," said La Salle to his Brothers, "by the Church, to be called by her to a work so holy and so lofty and for which she has chosen you to procure for children a knowledge of our religion and of the spirit of Christianity."[45] Though La Salle was ingenuous and firm in his insistence that the Brothers be loyal in their submission to the pastors of the Church[46], and thus in his insistence that the Brothers be lay ministers *of the Church*, it is also clear that, as Brother Michael McGinnis explains, for La Salle

> The ministry which the Brothers exercise on behalf of poor children is actually a participation in the saving work of God, whose will to save all humankind became incarnated in the life and ministry of Jesus. Just as Jesus revealed the way the way to God, so too the Brothers reveal the way to union with God through the instruction of their students, as 'ministers of God and dispensers of his mysteries'. This participation in the saving work of God and Christ is accomplished in and through the education, both expressly religious and secular, of the children, not in some separate religious dimension of life.[47]

When the Lasallians are striving to satisfy the rights of the child, including the poor child, to education, they are doing the work of the Church. This is the spiritual heritage that comes down to us in the Church from St. La Salle, who instructed his Brothers: "Jesus Christ has sent you and . . . the church, whose ministers you are, employs you."[48] When the Lasallians cannot pursue their ministry or *munus*, it is Jesus Christ's will that is frustrated—or so the Saint taught.

For Christians, there is no higher calling, no greater sending, than to do the missionary work Christ entrusted to his disciples. The untraditional initiative La Salle launched in 1680

---

reflection on the reality of lay ecclesial ministry . . . as a synthesis of best thinking and practice")

[45] *See* KOCH, *supra* note 36, at 54.

[46] *See* MCGINNIS, *supra* note 40, at 85 (discussing La Salle's meditation for the Chair of Peter, *On the Submission We Owe the Church*).

[47] *See id.* at 89.

[48] *See* KOCH, *supra* note 36, at 55.

in the face of the abject neglect of poor children did not receive papal or state approval until 1725, four years after the Saint's death. Furthermore, until the codification of 1917 his Institute was not incorporated into Canon Law.[49] Respectful though he was of the institutional Church and her right to govern, La Salle went to work for the poor—by organizing communities of Brothers and "the Christian Schools" without awaiting permission.[50] Against Gallican bishops who opposed the reforms of the Council of Trent, La Salle stood with the Church.[51] Within a Church that under the mandate of Trent was to raise the level of education of her seminarians and priests, La Salle sought to raise the level of education of even the poorest. Against the background of Gallican political claims over the life of the Church, La Salle formed a society of the Church without awaiting royal initiative or even permission.[52] La Salle would not have denied the right of royal or ecclesiastical authorities to regulate the activities of his society inasmuch as they might claim a share in authority touching the common good. The thought that would not have occurred to La Salle is this, that the work of educating the poor was essentially the government's and, therefore, its own to monopolize or neglect at will. This thought that wouldn't have occurred to La Salle dominates our thinking and deciding, leading *inter alia* to a systemic stifling of the conditions necessary to the success of the Lasallian initiative.

II. SOCIETIES, *MUNERA*, AND SUBSIDIARITY

I turn now to sketch the principles of Catholic social thought that call for the creation of legal and cultural conditions different from those that obtain in the United States today. The coordinate starting points of the Catholic position are that, first, society is an intrinsic perfection of the human person, and, second, genuine human societies have *munera* given by divine, natural, or positive (including ecclesiastical) law. On this analysis, furthermore, subsidiarity is a principle, not of devolution, but, first, of recognition of the respective social functions of given societies, and, second, of respect for and coordination of those societies and their *munera* and, as

[49] *See id.* at 33.
[50] *See id.* at 25–27, 33.
[51] *See id.* at 34.
[52] *See id.* at 8–20, 33. *See generally* SALM, *supra* note 30, *passim*.

necessary, of the provision of help to them, but only for their own immediate good and, mediately, for the common good. The *Catechism of the Catholic Church*, recapitulating the developments in magisterial teaching over the last century, traces *munera* and the complementary principle of subsidiarity to the human person's participation in the divine rule:

> God has not willed to reserve to himself all exercise of power. He entrusts to every creature the functions [*munera*] it is capable of performing, according to the capacities of its own nature. This mode of governance ought to be followed in social life. The way God acts in governing the world, which bears witness to such great regard for human freedom, should inspire the wisdom of those who govern communities. They behave as ministers of divine providence.[53]
>
> The teaching of the Church has elaborated the principle of *subsidiarity*, according to which a "community of a higher order should not interfere in the internal life of a community of lower order, depriving the latter of its functions [*munera*], but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good."[54]

On this Catholic view, in ruling himself individually through self-mastery, or, as concerns us here, at the level of society, through authority over a particular community, the human person is participating in the order of divine providential rule.[55] The principle of subsidiarity respects the plurality of such authorities, and determines the conditions under which they are entitled to receive aid or may be subject to regulation. Professor Hittinger explains,

> The Catholic position holds that the political sovereign is limited by the very existence of real group persons. A normal society, then, is not so much an expansion of the private so much as a multiplication of authorities embedded in group persons. On this view, subsidiarity is not devolution—rather, it is a principle governing the harmony and coordination of group

[53] CATECHISM OF THE CATHOLIC CHURCH ¶ 1884 (2d ed. 1997) [hereinafter CATECHISM].

[54] *Id.* ¶ 1883 (quotations omitted).

[55] Patrick McKinley Brennan, *The Decreasing Ontological Density of the State in Catholic Social Doctrine*, __ VILL. L. REV. __ (forthcoming 2007).

persons.[56]

What I have just summarized, I shall now unpack.

From the perspective of Catholic social thought, a leading error in modern moral and political philosophy—an error which leads to many other errors, to which Church teaching also responds—concerns man's nature as *intrinsically* social. The trend in modern thought is to say that the person can be, if he choose, supplemented—so to speak—by society. From John Locke (and others) our culture inherits the idea that each of us is to be about his or her own privatized mission. Although Locke had *God* assigning people their individual missions, what has endured of Locke's doctrine is the idea that each of us is essentially *autonomous*, that is, on an *individual* mission (from God?).[57] The Church, however, continues to teach that society is an intrinsic perfection of the human person. In the words of the *Catechism*: "The human person needs to live in society. Society is not for him an extraneous addition but a requirement of his nature."[58] The *Compendium of the Social Doctrine of the Church* elaborates:

> Made in the image and likeness of God (cf. Gen. 1:26), and made visible in the universe in order to live in society (cf. Gen. 2:20, 23) and exercise dominion over the earth (cf. Gen 1:26, 28-30), the human person is for this reason called from the very beginning to life in society: "God did not create man as a 'solitary being' but wished him to be a 'social being'. Social life therefore is not exterior to man: he can only grow and realize his vocation in relation with others."[59]

This passage is typical of the Catholic social thought of the last hundred years as it links man's essentially social perfection to God's plan for human participation in the divine rule. Man shares in the ruling power of God by being able to order things for himself and his fellows, but he does this through what Pope John Paul II referred to in *Veritatis Splendor* as a "participated

[56] Russell Hittinger, *Society, Subsidiarity, and Authority in Catholic Social Thought*, *in* AFTER AUTHORITY (Patrick McKinley Brennan ed.) (forthcoming 2007) [hereinafter Hittinger, *Society*].

[57] *See* MICHAEL J. WHITE, POLITICAL PHILOSOPHY: AN HISTORICAL INTRODUCTION 147–48 (2003).

[58] CATECHISM, *supra* note 53, ¶ 1879.

[59] PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶ 149 (2004) [hereinafter COMPENDIUM].

theonomy."[60] Though free, and both capable of and charged with self-rule, human persons are always *under law*[61]—a point to which we shall return below.

Intrinsically importunate of society, the human person works out his earthly life in all manner of associations and partnerships with other persons. As I shall use it, "society" is a technical term for a particular form of social unity: human unity that is not a merely instrumental (as, for instance, partnerships usually are),[62] but also *an intransitive human good or perfection*. We moderns gravitate toward the common usage according to which "society" is just an aggregate total of individuals; we have grown used to the modern idea that only individual men and women exist. But, according to the Catholic mind as expressed in the *Catechism*,

> A *society* is a group of persons bound together organically by a principle of unity that goes beyond each one of them. As an assembly that is at once visible and spiritual, a society endures through time: it gathers up the past and prepares for the future. By means of society, each man is established as an 'heir' and receives certain 'talents' that enrich his identity and whose fruits he must develop. He rightly owes loyalty to the communities of which he is part and respect to those in authority who have charge of the common good.[63]

The Church understands herself to be a society, one formed by God, rather than by mere sociological adherence.[64] The

---

[60] JOHN PAUL II, ENCYCLICAL LETTER *VERITATIS SPLENDOR* ¶ 41.2 (1993).

[61] Russell Hittinger draws the implications of this participated theonomy, in the context of commenting on Aquinas's doctrine of natural law as a participation in the eternal law:

> By the impression of created light God induces the creature to share in the rules and first measures of the eternal law. The radical implications of Thomas's teaching should be evident. Every created intelligence not only has a competence to make judgments, but to make judgments according to a real law—indeed, a law that is the form and pattern of all other laws. Thus, the legal order of things does not begin with an acquired virtue, possessed by a few; nor does it begin with the offices and statutes of human positive law; nor does it begin with the law revealed at Sinai. God speaks the law, at least in its rudiments, to every intelligent creature.

RUSSELL HITTINGER, THE FIRST GRACE 98 (2003).

[62] *See* Hittinger, *Society*, *supra* note 56.

[63] CATECHISM, *supra* note 53, ¶ 1880.

[64] *See* VATICAN II, DOGMATIC CONSTITUTION ON THE CHURCH: *LUMEN GENTIUM* ¶ 4 (Nov. 21, 1964), *reprinted in* THE BASIC SIXTEEN DOCUMENTS OF VATICAN COUNCIL II, at 1, 3 (Austin Flannery ed., 1996) (1964) [hereinafter *LUMEN GENTIUM*] ("Hence the universal church is seen to be 'a people made one by the unity of the

Institute of the Brothers of the Christian Schools—like the *Society* of Jesus that preceded it in time—is another society, formed within and ordained by the Church, and thus possessed of a right to exist (unless and until suppressed by the Church because of its failure to achieve its *munus*). The family is still another society, formed by a man and a woman, and first ordained by God. This society also has a right to exist and to be recognized.[65] Schools, too, can be societies in their own right, for they are—or can be—"group[s] of persons bound together organically by a principle of unity that goes beyond each one of them,"[66] gathering up the past, preparing for the future, and enriching the identity and fruits of those who are loyal to it. Such societies will be subject to appropriate regulation by the state, in furtherance of the common good, but their *right to exist and function* is not conferred by the state.

Before pursuing the last point, it will be helpful to develop a little more fully the concept of a society. Thomas Aquinas affirms that there are wholes—that is, there are true unities—that are not the unity of an individual substantial kind; these are "unities of order":

> It must be known that the whole which the political group or the family constitutes has only a unity of order, for it is not something absolutely one. A part of this whole, therefore, can have an operation that is not the operation of the whole, as a soldier in an army has an activity that does not belong to the whole. However, this whole does have an operation that is not proper to its parts but to the whole.[67]

As Johannes Messner explains, "The unity of society is neither a mere aggregation of self-sufficient individuals nor a 'formation' organized for an external purpose. It is," Messner

Father, the Son and the holy Spirit.' "). *See generally* AVERY DULLES, MODELS OF THE CHURCH (2002); JOSEPH RATZINGER, CALLED TO COMMUNION: UNDERSTANDING THE CHURCH TODAY (1996).

[65] *See infra* pp. 130–44.

[66] CATECHISM, *supra* note 53, ¶ 1880.

[67] ST. THOMAS AQUINAS, IN DECEM LIBROS ETHICORUM ARISTOTELIS AD NICHOMACHUM EXPOSITIO, lib. I, lec. 1, no. 5 (Marietti 1949) ("Sciendum est autem, quod hoc totum, quod est civilis multitude, vel domestica familia, habet *solam unitatem ordinis*, secundum quam non est aliquid simpliciter unum. Et ideo pars eius totius, potest habere operationem, quae non est operatio totius, sicut miles in exercitu habet operationen quae non est totius exercitus. Habet nihilominus et ipsum totum aliquam operationem, quae non est propria alicuis partium, sed totius, puta conflictus totius exercitus").

continues, "a unity of order, that is, a unity in virtue of an immanent end coordinating the conduct of its members by means of their self-determination. Order signifies unity due to an inner principle of form."[68] Furthermore, according to St. Thomas, the unity of order that constitutes a society is deserving of, as Maitland would later agree, the predicate "person." The reason for this predication, which refers to something that is unique by reason of its dignity,[69] emerges from Professor Hittinger's explication of what it is to enjoy a unity of order:

> Things enjoying a unity of order each possess what is individually proper to themselves—certain operations and acts not reducible to the commonality, but which flow, rather, from a natural or spontaneous unity of their nature—in a human person, sensing, thinking, judging, willing, and so forth. These natural properties are not dissolved or cancelled by membership in a group. At the same time, a society enjoys a real unity transcending mere aggregation of the members. Wherever there are plural rational agents, aiming at common ends, through united action, and where the unity is one of the intrinsic goods aimed at, we have a society—something distinct in dignity. To be sure, it is real—the crew team, the college, the city, the marriage. But it is neither a substance nor a mere imputation. A society will hold itself out to the rest of the world as something distinct in dignity, possessing certain rights and responsibilities.[70]

This is not just an additive cumulation of individuals, but unity distinct by reason of its dignity—a group person.[71]

The metaphysics on which all this depends, as more than a mere imputation, is not commonly embraced today, but it would be a disservice to imagine that it has been limited to the Catholic tradition. Re-enter Maitland:

> When . . . a body of twenty, or two thousand, or two hundred

---

[68] JOHANNES MESSNER, SOCIAL ETHICS: NATURAL LAW IN THE WESTERN WORLD 117–18 (J.J. Doherty trans., 3d ed. 1965).

[69] *See* Hittinger, *Society*, *supra* note 56, at __ (discussing ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. I, Q. 29, art. 3, at 31 (forthcoming) [hereinafter *SUMMA THEOLOGIAE*]).

[70] Hittinger, *Society*, *supra* note 56, at 2. Not every thing that enjoys a "unity of order" is a society of which "person" can be predicated. *See id.* (quoting *SUMMA THEOLOGIAE*, *supra* note 69, Q. 47, art. 3, at 261–62).

[71] *See, e.g.*, MESSNER, *supra* note 68, at 127–29 (discussing man as both individual and social with respect to the function and goal of society in service to the common good).

> thousand men bind themselves together to act in a particular way for some common purpose, they create a body, which by no fiction of law, but by the very nature of things, differs from the individuals of whom it is constituted. . . .
>
> . . .
>
> . . . If the law allows men to form permanently organized groups, those groups will be for common opinion right-and-duty-bearing units; and if the law-giver will not openly treat them as such, he will misrepresent, or as the French say, he will 'denature' the facts . . . . For the morality of common sense the group is person, is right-and-duty- bearing unit.[72]

To acknowledge the additive total of the individuals but deny the existence of the unity of order that is a group person would be to deny the *society*. Again Maitland:

> Let the moral philosopher explain this, let him explain it as illusion, let him explain it away; but he ought not to leave it unexplained, nor, I think, will he be able to say that it is an illusion which is losing power, for, on the contrary, it seems to me to be persistently and progressively triumphing over certain philosophical and theological prejudices.[73]

One response to some people's affirmation of society as a true unity of order—a group person—is to deny it, as Margaret Thatcher did.[74] Another is to follow a variation on one of the courses adumbrated by Maitland: The state can claim exclusive power over whether a society can be created and, if created without concession of the state, whether it is to be granted recognition by the state. The latter course is where the action has unfolded in the modern period. With the (gaping) exception of the unborn, the modern state has not denied the right of *individuals* to exist. It has been the modern trend, however, for the state to deny that societies have a *right* to exist (unless and until the state grant such a revocable right). Take an example adduced by Maitland: "It issues in the famous declaration of August 18, 1792: 'A State that is truly free ought not to suffer within its bosom any corporation, not even such as, being dedicated to public instruction, have merited well of the

[72] MAITLAND, *supra* note 3, at 63, 68 (quotations omitted); *see also* Hittinger, *Society*, *supra* note 56, at 2.

[73] MAITLAND, *supra* note 3, at 68. On the history of theorizing about "group personality" in modern political thought, see DAVID RUNCIMAN, PLURALISM AND THE PERSONALITY OF THE STATE (1997).

[74] *See* Hittinger, *Society*, *supra* note 56, at 1.

country.' "[75] Take another example from France, this one adduced by Hittinger. The Third French Republic claimed a comprehensive right over societies, in this case religious societies, when in 1901 it declared by legislation: "No religious congregation may be formed without an authorization given by law that determines the conditions of its exercise . . . . The dissolution of a congregation or the closing of any establishment may be declared by a cabinet decree."[76] As it happens, Rousseau had already gone several steps further when he insisted: It is "important that there should be no partial society in the state."[77] It has just this sort of totalizing claim that the Church has been sure to counter, reminding the world that societies both exist and, sometimes, exist by right that precedes the state and its law.

Which brings us back to the question of *munus*. Just as, according to the *philosophia perennis*, part of what constitutes a substantial person is his possession of a function, so too, according to Catholic social thought, part of what makes a society what it is, is its *possession of a munus*. Professor Hittinger has traced the consolidation of the Church's teaching on *munera*, and it would be otiose to repeat that history.[78] The substantive claim of import here is that part of what it is to be a society is to have a *munus*, which is *a determinate share in ruling power*. *Munera* are determined sometimes primarily by divine law, as in the case of the Church and the family; sometimes primarily by ecclesiastical law, as in the case of the Christian Brothers; sometimes primarily by civil law, as in the case of, say, corporations. I say "primarily," because in most of the aforementioned cases there may be multiple determinations. For example, marriage is a society ordained by both natural law and divine positive law; the state is ordained by nature but determined by human positive law.

If we are not totally unaccustomed to the idea that certain societies have their particular *rights*, it was the contribution of Pius XI, according to Professor Hittinger, "to make clear that [such] rights are not derived from human nature abstractly

[75] MAITLAND, *supra* note 3, at 66.

[76] Hittinger, *Society*, *supra* note 56, at 7 n.24.

[77] JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 32 (Donald A. Cress, trans., 1983).

[78] Hittinger, *Social Pluralism*, *supra* note 8.

considered, but rather from human nature as already bearing (implicitly or explicitly) social *munera*."[79] Before we can understand the rights and immunities, we must know what they protect; before we can do justice in society, we need to know where the *munera* have already been assigned. Thus, as Hittinger explains,

> [W]hen the political authority recognizes and helps to coordinate the social roles and vocations, it is not in the first place a question of distributive justice; for the magistrate does not distribute the *munera* which have been assigned by creation and redemption; rather, by recognizing these *munera* (including the function of the state itself), the magistrate is recognizing a legal justice that neither begins nor terminates in the state.[80]

With respect to the *munera* that are distributed by creation and redemption, their bearers are already existentially poised to give the gift of the office, and when the state comes to consider questions of social justice, it confronts a world in which certain *munera* are already in operation and contributing to the common good.[81] *Munera* that are distributed solely by positive law dispose individuals and societies to action through their reception, but the magistrate distributing such *munera* (e.g., the judicial office) does so against the background of a world in which human individuals and societies are already, through their respective *munera*, participating in the divine rule.

The point is that the state and its magistrate never did possess plenary ruling power in the first place—though this is exactly what subsidiarity, as commonly discussed, presupposes, to wit, that power should devolve *from the top* to the smallest unit that can get the job done effectively. Within a world packed with *munera* already in action or poised to act, subsidiarity is the principle that (1) *munera* conferred by creation and redemption are to be respected and (2) positive law is to be used to facilitate and harmonize the aforementioned *munera* and to confer only those additional *munera* that are either consistent with or of assistance to those that precede positive law. As Hittinger

[79] *Id.* at 58.

[80] *Id.* at 58–59.

[81] For an analysis of the relationship between ecclesial *munera* and the conditions of their exercise, see *LUMEN GENTIUM*, *supra* note 64, *in* SACROSANCTUM OECUMENICUM VATICANUM II, CONSTITUTIONES, DECRETA, DECLARATIONES 215–19 (1993); *see also* Hittinger, *Social Pluralism*, *supra* note 8, at 59–60.

explains,

> [S]ubsidiarity cannot create a social ontology, and it would be useless or even destructive to make subsidiarity do that kind of work. Any application of the principle of subsidiarity ahead of the distribution of offices and powers is to put the cart before the horse. For the question of just relations between social offices and institutions presupposes the existence of these social forms, each having its own *esse proprium*. And where the nature and scope of these social forms is in doubt, subsidiarity remains a principle without matter.[82]

Every society possessed of its own proper being is, if it is functioning as it ought, a locus of genuine authority. It is not by concession of the state that plural authorities exist; plural authorities are the natural state of affairs, which totalizing governments denature and destroy. Again, this natural pluralism is not a lawless state: every genuine society is such because it possesses a *munus*, and this is a participation in the divine governance. Properly functioning families, churches, and schools are participants in the divine rule. Every society is thus under law; its genuine authority is a function of its possession of genuine, lawful ruling power. It falls to the state, then, as the instrument of civil society, to coordinate the interaction of plural societies, with their respective *munera*, for the common good. What Pope Leo XIII said regarding the state and workers' rights to band together in associations also applies *mutatis mutandis* to the state's relationship to the plurality of genuine societies:

> Private societies, then, although they exist within the body politic, and are severally part of the commonwealth, cannot nevertheless be absolutely, and as such, prohibited by public authority. For, to enter into a "society" of this kind is the natural right of man; and the [*civitas*] has for its office to protect natural rights, not to destroy them. . . .
>
> . . .
>
> . . . The State should watch over these societies of citizens banded together in accordance with their rights, but it should not thrust itself into their peculiar concerns and their organization, for things move and live by the spirit inspiring them, and may be killed by the rough grasp of a hand from without.[83]

---

[82] Hittinger, *Social Pluralism*, *supra* note 8, at 60–61.

[83] LEO XIII, ENCYCLICAL LETTER *RERUM NOVARUM* ¶¶ 51, 55 (1891).

I have lingered over the right of non-state-created societies to exist and be recognized because, unless and until we are poised to assert this right, too often, as history reveals, the state will find it expedient to ignore or deny the right. Frequently, however, it is not enough for the state merely to recognize the societies that it does not create; sometimes such societies need help. To "watch over,"[84] as Leo says, will sometimes mean to assist. In the root sense of *subsidium*, subsidiarity refers to help or aid, as in the English "subsidy." But this is not all there is to—indeed, this is not the core of—subsidiarity as understood in Catholic social thought, Hittinger explains, developing the historical work of the nineteenth century Jesuit Luigi Taparelli that influenced Popes:

> [S]ubsidiarity evokes the concept of auxiliary troops in the Roman legion which sat below' [*sub sedeo*], ready and duty-bound to render service. Hence, it describes the right. . . of social groups, each enjoying its own proper mode of action. While sometimes identified with the word *subsidium* (help, assistance), the point of subsidiarity is a normative structure of plural social forms, not a trickling down of power or aid. . . . [S]ocial justice is that kind of order that ensues when each person is capacitated to 'exercise his social *munus*," to contribute to the common good according to his proper office and role. This may or may not require the giving of aid, the correction of a deficiency, or the removal of barriers to the performance of social duties, but what it always entails is respect for a pluriform social order.[85]

Johannes Messner brings into focus the true nature of subsidiarity by avoiding the common expression "the principle of subsidiarity," preferring instead the locution "the principle of subsidiary function."[86] Subsidiarity and function/*munus* travel

[84] *Id.* ¶ 55.

[85] Russell Hittinger, *Introduction to Modern Catholicism*, *in* I THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE 3, 23 (John Witte Jr. & Frank Alexander eds., 2006) (quoting PIUS XI, ENCYCLICAL LETTER *DIVINI REDEMPTORIS* ¶ 32 (1937) [hereinafter *DIVINI REDEMPTORIS*]); *see also* Thomas C. Behr, *Luigi Taparelli D'Azeglio, S.J. (1793–1862) and the Development of Scholastic Natural-Law Thought as a Science of Society and Politics*, 6 J. MKTS. & MORALITY 99, 105 (2003); THOMAS BEHR, LUIGI TAPARELLI AND THE 19TH CENTURY NEO-THOMISTIC "REVOLUTION" IN NATURAL LAW AND CATHOLIC SOCIAL SCIENCES 22–38 (2000) (Ph.D dissertation, State University of New York at Buffalo); MESSNER, *supra* note 68, at 212.

[86] MESSNER, *supra* note 68, at 212.

together. "[S]ubsidiarity . . . is a principle derivative from social justice: namely, that when *subsidium* be given either by the parts to the whole or the whole to the parts the plurality of functions or *munera* should not be destroyed or absorbed."[87] The governmental instrument that we refer to as the state exists to serve the plural societies that co-exist with and within it, with a view toward the common good. According to Pope Pius XI, in *Divini Redemptoris*, "the genuine and chief [*munus*] of public and civil authority consists precisely in the efficacious furthering of this harmony and coordination of all social forces,"[88] which, as the Pope observes, includes genuine societies. The goal is to "fuse[] [them] into a harmonious unity inspired by the principle of the common good."[89]

It may be that the society that is the Church will, for her part, ordinarily do her work best without the aid of the state. Other societies, however, and particularly the family, will frequently need the assistance of the state, but from this it does not follow that there is a deficiency on the part of the family:

> [S]ubsidiarity does not *per se* imply a deficiency in the person or office receiving the *subsidium*. The family receives help from the wider political community, but that does not mean that the family is itself "deficient"—rather it means that the family's unique *munus* does not constitute the entirety of the common good, and it is entirely natural for the family to rely upon institutions other than itself . . . . [S]ometimes there really is a deficiency. A family, for example, can come apart at the seams, and another power has to intervene to assist. . . . Subsidiarity in this kind of case demands that the intervention have as its goal the restoration rather than the absorption or elimination of the function, mission, role of the institution being assisted.[90]

Subsidiarity is an expression of pluralism, a principle of non-absorption of one function by another. Further, as a principle for harmonizing the plural social authorities and of providing aid as necessary, it governs the interaction of all human societies, including family and Church, toward the common good. In sum:

> [T]he principle of subsidiary function, as a principle delimiting

[87] Hittinger, *Social Pluralism*, *supra* note 8, at 59.

[88] *DIVINI REDEMPTORIS*, *supra* note 85, ¶ 32.

[89] *Id.*

[90] Hittinger, *Social Pluralism*, *supra* note 8, at 59–60; *see also* J. Verstraeten, *Solidarity and Subsidiarity*, *in* PRINCIPLES OF CATHOLIC SOCIAL TEACHING 133, 135–36 (David Boileau ed., 1994).

> social competencies, is an ontological principle, and because it belongs to the ontological order of the common good itself, it is not less an ontological principle than is the common good principle: like the common good principle, it has its origin in the unity of man's personal and social nature, and its substance is determined by the order of ends indicated thereby . . . .
>
> . . .
>
> . . . The principle of subsidiary function stands *opposed to the omnipotence of organizations just as it is opposed to the omnipotence of the state.* Because the subsidiary function principle protects the particular rights of the natural and the free associations against the state's claim to omnicompetence, it is a *fundamental principle of the pluralistic society*: the subsidiary principle stands against the totalitarian claim of the state to competence; the subsidiary principle is the natural *fundamental law of the free society*, guaranteeing the particular rights of "society" as distinct from the state.[91]

Subsidiarity is not a mandate for either devolution or a government handout; subsidiarity highlights obligation:

> [T]he principle of subsidiary function also confers an obligation . . . *on the member societies and individuals*, since it protects their own competencies and rights. Nothing is gained by merely appealing to the subsidiary function principle in reply to the state's tendency to expand. The competencies and rights protected by the subsidiary function principle must be used with vigor; the responsibilities underlying them as far as possible must be fulfilled through one's own power and initiative.[92]

With these structural principles in mind, I turn now to the specific societies—the specific group persons—that are my present concern.

III. CHURCHES, SCHOOLS, FAMILIES: SUBSIDIARITY IN ACTION

The work of the society that is the Church might sometimes benefit, as a matter of fact, from aid from the state; the works of the distinct societies ordained within the Church might sometimes benefit from, if not outright need (if they are to succeed), the affirmative assistance of the state. In abjuring all privileges for herself, as she does today, the Church by no means denies the liceity of her receiving, on her own terms, aid from the state. In the words of the Second Vatican Council in *Dignitatis*

[91] MESSNER, *supra* note 68, at 210, 213.
[92] *Id.* at 213.

humanae:

> The freedom of the Church is the fundamental principle governing relations between the Church and public authorities and the whole civil order. . . .
>
> . . .
>
> . . . The Church also claims freedom for herself as a society of men with the right to live in civil society in accordance with the demands of the Christian faith.[93]

Certainly, this claim concerns the negative liberty of the Church, but the Church also claims a positive right against the state to have enacted into law and put into practice at least some of the conditions necessary to the Church's fulfilling her mission:

> When the principle of religious freedom is not just proclaimed in words or incorporated in law but is implemented sincerely in practice, only then does the Church enjoy in law and in fact those stable conditions which give her the independence necessary for fulfilling her divine mission.[94]

We need not linger over which positive conditions are to be satisfied first, however, because, of course, the U.S. Constitution as currently interpreted by the Supreme Court holds it lawful for the state purposely or directly to aid religion. If, for example, the legislature of the Commonwealth of Pennsylvania passed a statute appropriating funds directly to the Institute of the Brothers of the Christian Schools (along with a dozen other Christian and non-Christians religious societies), it would violate the Constitution as it is currently interpreted. The principle of subsidiarity, which precedes the Constitution, is thus rendered powerless to do its work. We can doubt whether ours is the regime the Framers of the First Amendment sought and anticipated, but it remains the dispensation within which we are given to live—except, perhaps, in moments of legitimate advocacy for a better interpretation of the Framers' Constitution.

We can continue to complain that the state is failing to meet its obligations to the Church, but more promising today is the complaint that *the state is failing in its obligation under subsidiarity to help the family fulfill its function*. It is the mission of the family to be the primary educator of its children, but many families will fail in that *munus* without help. Such failure is the predictable outcome of a regime that pits (all but

[93] *DIGNITATIS HUMANAE*, *supra* note 39, ¶ 13.
[94] *Id.*

rich) children against the state. A collateral consequence of this failure is, of course, a frustration of the Church's own work to cooperate with parents in bringing children to salvation. *The constitutionally cognizable claim*, however, is that parents have a right that is not being honored, to wit, the (limited) right to direct the education and upbringing of children in their charge. That right is cognizable as part of our current constitutional regime, thanks to *Pierce*, about which I shall have more to say below.

Catholic teaching on the function of the family is sufficiently well-known that it will suffice here, starting from that *munus*, to summarize the Catholic argument, first, *against* the current individual-versus-state educational apparatus and, second, *in favor of* a family-centered and subsidiarity-structured system of education (in which the Church, too, will have an opportunity to fulfill her *munus* vis-à-vis children). Though the Church's teaching begins from the respective *munera* of various societies, the reader will observe that, for purposes of making claims for positive protection and help, *munera* are sometimes translated into the idiom of rights-and-duties. But make no mistake: At root, what is at issue are plural and particular shares in the divine ruling power, nothing less.

The family is a distinct society, with its own function, its own corresponding duties and rights.

> *The family, the natural community in which human social nature is experienced, makes a unique and irreplaceable contribution to the good of society.* The family unit, in fact, is born from the communion of persons. " '*Communion*' has to with the personal relationship between the 'I' and the 'thou.' '*Community*' on the other hand transcends this framework and moves towards a 'society,' a 'we.' The family, as a community of persons, is the first human 'society.' "
>
> . . .
>
> *The priority of the family over society and over the State must be affirmed.* The family in fact, at least in its procreative function, is the condition itself for their existence. With regard to other functions that benefit each of its members, it . . . [precedes] in importance and value the functions that society and the State are called to perform. The family possesses inviolable rights and finds its legitimization in human nature and not in being recognized by the State. *The family, then, does not exist for society or for the State, but society and the State exist for the*

family.[95]

Parents hold the duty and therefore the right to be the primary educators of their children.

> The right and duty of parents to educate their children is *essential*, since it is connected with the transmission of human life; it is *original and primary* with regard to the educational role of others, on account of the uniqueness of the loving relationship between parents and children; and it is *irreplaceable and inalienable*, and therefore incapable of being entirely delegated to others or usurped by others.[96]

Parents have a duty and right to give their children, and children have a right to receive, education that conforms to the parents' religious convictions.

> *Parents are the first educators, not the only educators, of their children. It belongs to them, therefore, to exercise with responsibility their educational activity in close and vigilant cooperation with civil and ecclesial agencies.* . . . Parents have the right to choose the formative tools that respond to their convictions and to seek those means that will help them best to fulfil[l] their duty as educators, in the spiritual and religious sphere also. [97]

The state is under a duty to respect parents as the primary educators of children and, observing the principles of distributive justice, to assist parents as needed.

> The civil authority must . . . recognize the right of parents to choose with genuine freedom schools or other means of education. Parents should not be subjected directly or indirectly to unjust burdens because of this freedom of choice.[98]

> Public authorities have the duty to guarantee this right [of parents to be the primary educators of their children] and to ensure the concrete conditions necessary for it to be exercised.[99]

> Parents, who have a primary and inalienable duty and right in regard to the education of their children, should enjoy the fullest liberty in their choice of school. The public authority, therefore, whose duty it is to protect and defend the liberty of

[95] COMPENDIUM, *supra* note 59, at ¶¶ 213–14.
[96] *Id.* ¶ 239.
[97] COMPENDIUM, *supra* note 59, ¶ 240.
[98] *DIGNITATIS HUMANAE*, *supra* note 39, ¶ 5.
[99] COMPENDIUM, *supra* note 59, ¶ 240.

> the citizens, is bound according to the principles of distributive justice to ensure that public subsidies to schools are so allocated that parents are truly free to select schools for their children in accordance with their conscience.[100]

The refusal to provide public economic support to non-public schools that need assistance and that render a service to civil society is to be considered an injustice. "Whenever the State lays claim to an educational monopoly, it oversteps its rights and offends justice. . . . The State cannot without injustice merely tolerate so-called private schools. Such schools render a public service and therefore have a right to financial assistance."[101]

The state is obligated under the correlative principle of subsidiarity, which has both positive and negative dimensions, to come to the aid of societies in need:

> Subsidiarity, understood *in the positive sense* as economic, institutional or juridical assistance offered to lesser social entities, entails a corresponding series of *negative* implications that require the State to refrain from anything that would de facto restrict the existential space of the smaller essential cells of society. Their initiative, freedom and responsibility must not be supplanted.[102]

> *In their relationship to the family, society and the State are seriously obligated to observe the principle of subsidiarity*. In virtue of this principle, public authorities may not take away from the family tasks which it can accomplish well by itself or in free association with other families; on the other hand, these same authorities have the duty to sustain the family, ensuring that it has all the assistance that it needs to fulfil[l] properly its responsibilities.[103]

This line of reasoning will be well-nigh incomprehensible to those who suppose that education is intrinsically the work of the state and that, when non-state actors are permitted to administer schools, we witness no more than the state's opting to outsource what remains essentially its own work. But if we

---

[100] VATICAN COUNCIL II, DECLARATION ON CHRISTIAN EDUCATION *GRAVISSIMUM EDUCATIONIS* ¶ 6 (1965), *reprinted in* VATICAN COUNCIL II, *supra* note 33, at 731 [hereinafter *GRAVISSIMUM EDUCATIONIS*].

[101] COMPENDIUM, *supra* note 59, ¶ 241.

[102] *Id.* ¶ 186.

[103] *Id.* ¶ 214.

start, as the Church teaches us to start, by recognizing the existence of plural societies, their respective *munera*, and subsidiarity understood as an ontological principle of plural social forms and a duty of non-usurping assistance. Then, if we come to children within this context of the divinely ordained societies that are Church and family, we will be in the position to specify and respect the place of religious schools in the overall mix and motion of civil society as a whole. Such societies as schools are not mere concessions of the state; they belong, as a natural right, though subject to regulation on behalf of the common good, to those who wish to create and administer them in fulfillment of their respective *munera*.

The reason that schools may be subject to regulation is, again, that the schools' efforts do not exhaust the conditions necessary to achievement of the common good of all. The state's particular function is the one of realizing the truly *common* good of civil society, and it will do so in part by respecting and, as necessary, regulating and coordinating the efforts of the plural societies that both precede it and co-exist within it.

> The principle of subsidiarity is what brings the functions of the state into the perspective of the actual common good. This is characterized by the fact that the political community is an association of individual and social persons with their own existential ends and their corresponding tasks, rights, and powers, who can reach their essential self-fulfillment only by complying with the corresponding responsibilities implied in these ends. The state is the institution for coordinating these powers and activities for the good of all.[104]

If the Church could stick to her spiritual knitting, she would thereby reduce the occasions and opportunities for governmental regulation of her ecclesial *munera*; under our constitutional dispensation, secure is the freedom to believe in what one wishes in his condominium. But the Church's *munus* includes concrete actions in the world, and through her works in fulfillment of her *munus*, the Church invites occasions for regulation in view of the common good. Those who care about the success and integrity of the Church's activities are right to worry lest the "strings" that come attached to benefits received from government bind the hands of the Church and frustrate her mission.[105] But the

[104] MESSNER, *supra* note 68, at 630.

[105] *Cf.* Vischer, *Principle of Governance*, *supra* note 6, at 115 ("[R]easonable

ontological principle of subsidiarity denies that plural societies should be autonomous societies. Over their long history, Lasallian schools have been the beneficiaries and dis-beneficiaries of countless regimes. When the conditions a particular regime imposes would vitiate the Lasallian work, Lasallians are free to close up shop, as it were, and pursue their *munera* elsewhere. It is no secret that the Church is finding more fertile mission territories than, say, Greenwich, CT, or Palo Alto, CA. The question I am pursuing here is what those who care about children, families, the Church, and the Lasallians in particular should pursue today in the United States. Again, *munera* and the principle of subsidiarity put these societies—these group persons—under an obligation to do their respective tasks "with vigor."

IV. SERIOUSLY?

Obviously enough, though I have yet to make the point explicit, my normative argument tends toward a proximate appeal to expand "school choice." The Constitution is for the moment interpreted to allow the state to provide some indirect assistance to religious schools, so long as it does so in a way that is neutral with respect to religion.[106] The rule of *Zelman* respects and begins to give concrete effect to the principle of *Pierce*, according to which our Constitution guarantees the "liberty of parents and guardians to direct the upbringing and education of children."[107] In the view of the *Pierce* Court, "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[108] *Pierce* was decided on substantive due process, not First Amendment,

minds differ as to the precise contours of the line between government and market-based solutions to social problems . . . .").

[106] Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002) ("In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.").

[107] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).

[108] *Id.* at 535.

grounds, and it may well be that our Supreme Court has "yet to come up with a good *theory* to explain its holding in *Pierce*."[109] But if the Court is still in search of a theory as it goes forward giving effect to *Pierce* (as it did in *Zelman*), Catholics are already possessed of a theory that gives them reason, as Richard Garnett says, "to take *Pierce* seriously."[110] And if, with Professor Garnett, we do take *Pierce* seriously, and for the reasons I have been developing,

> [W]e should then say that state functionaries, guided and restrained by a proper humility about their authority and competence, should meddle with parents' educational decisions only to prevent *harm*, very carefully defined, to a child. That is, they should *not* intervene simply whenever they think intrusion or oversight would serve the Government's notion of the child's 'best interests' or its own perceived need and claimed prerogative to create a certain kind of citizen.[111]

Professor Garnett continues immediately thereafter in a footnote:

> In my view, government 'intervention' in the family *is* intervention. [James Dwyer takes a different view:] "[T]he reality is that the family is not a separate, primordial sphere that is or can be cordoned off from the power of the state. Quite the opposite. The law creates the family, and things could not be otherwise . . . ." But this is *not* 'the reality.' The law no more 'creates' the family than the Rule Against Perpetuities 'creates' dirt.[112]

Catholics should find it easy to, and they should be hopeful that legislators and the Court will, take *Pierce* seriously. The future of the Lasallian *munus* in the U.S., to say nothing of the fate of countless non-rich families and their children, would seem to depend upon it, or at least on the expansion of "school choice."

For some three decades, the combined voice of Professors John Coons and Steven Sugarman has commended "school choice" to us on quite plausible grounds. Coons and Sugarman argue that parents should be enabled to choose their children's

---

[109] Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children,* 76 NOTRE DAME L. REV. 109, 112 n.21 (2000).

[110] *Id.* at 114.

[111] *Id.*

[112] *Id.* at 114 n.29 (quoting James G. Dwyer, *Spiritual Treatment Exemptions to Child Medical Neglect Laws: What We Outsiders Should Think*, 76 NOTRE DAME L. REV. 147, 167 (2000)).

schools because they ordinarily know their children better than anyone else, ordinarily care about their children more than anyone else, and are accountable for their children as is no one else.[113] In its elaborated forms, this argument has been one of the prime movers in the movement that has begun to turn people's attention to the exigence of school choice. If we have reason to be grateful for this development, we should at least be wary of the underside of the argument from the utility of parental choice. "The state" is all too happy to calculate utility and ensure that it is maximized according to principles of its own choosing. For Catholics, however, the reason for making the state responsible to families is not any assessment of utility or calculation of consequences; it is, rather, that the society that is the family is intransitively "*the first and vital cell of society*."[114] Its *munus* is given. If it happens that a particular family cannot perform its function, subsidiarity will require aid to that family, with a view toward restoring it, if possible, to proper functioning.

Furthermore, for the reasons developed above, it is no argument for centralizing state control that the *ordinary* state of affairs will require aid to the family. The family's *munus* does not exhaust the common good, and it is the *ratio essendi* of the state to coordinate and assist primary societies with a view toward their own respective goods and toward the common good of all.[115] Again, the right of the family to perform its essential function is in no way the contingent product of a predictive calculation of its wisdom or practicality, nor is it attenuated or vitiated by its need for help. As Professor Garnett suggests,

---

[113] *See, e.g.*, JOHN E. COONS & STEPHEN D. SUGARMAN, EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL 52–61 (1978); JOHN E. COONS & STEPHEN D. SUGARMAN, MAKING SCHOOL CHOICE WORK FOR ALL FAMILIES subdiv. I (1999), *available at* http://www.pacificresearch.org/pub/sab/educat/making_choice/main2.html.

[114] COMPENDIUM, supra note 59, ¶ 211.

[115]

> In the first place comes the family, instituted directly by God for its peculiar purpose, the generation and formation of offspring; for this reason it has priority of nature and therefore of rights over civil society. Nevertheless, the family is an imperfect society, since it has not in itself all the means for its own complete development; whereas civil society is a perfect society, having in itself all the means for its peculiar end, which is the temporal well-being of the community; and so, in this respect, that is, in view of the common good, it has pre-eminence over the family, which finds its own suitable temporal perfection precisely in civil society.

DIVINI ILLIUS MAGISTRI, *supra* note 26, ¶ 12 (1929).

> Perhaps *Pierce* and the cluster of values and maxims for which it is thought to stand are best defended not in terms of parents' individual 'rights' against government, and certainly not in terms of ownership and property, but instead in terms of subsidiarity . . . . On this view, the State properly refrains from second-guessing families on matters of education and the transmission of religious tradition not only out of respect for the religious freedom and parental authority of the individuals situated within those families, but also out of wise regard for those families' integrity and health, precisely because the integrity and freedom of these 'vital cells' is important to the common good.[116]

From where Professor Garnett leaves off I would only add, and I trust he would agree, that it is the antecedent *munus* of the family that calls for this result.

In the context of the above observations about the family, Professor Garnett observes and approves the potentially "subversive" effect of societies, such as the family, that mediate between the state and individuals.[117] Such subversion of statist claims occurs when the family's insistence upon fulfillment of its *munus* (in concert, we might add, with the Church's fulfillment of her own) forces itself upon the state and insinuates itself into the life of civil society. Civil society and its agent, the state, are thus made to recognize and serve the antecedent societies and their respective *munera*. It is the givenness of the *munera* that entitles them to respect and, if necessary, aid. Subsidiarity does not assign these functions; recognizing and respecting them, it insists upon aid to meet societies' given responsibilities. We will be able to take *Pierce* seriously if we recognize that education is primarily (though not exclusively) the work of a group person that is not the creation of the state.

"[I]f we take *subsidiarity* seriously," Professor Robert Vischer has argued, "we will be very cautious in collectivizing our conception of the good."[118] For all the reasons I have been developing, one should want to take subsidiarity seriously. In Hittinger's phrase, it is a principle derivative of basic social justice; or, as Messner prefers to say, it is an ontological

---

[116] Garnett, *supra* note 109, at 144–45.

[117] *Id.* at 145–46.

[118] Robert K. Vischer, *Subsidiarity as Subversion: Local Power, Legal Norms, and the Liberal State,* 2 J. CATH. SOC. THOUGHT 277, 309 (2005) [hereinafter Vischer, *Subversion*] (emphasis added).

principle.[119]

What, then, does Professor Vischer ask of us if we are to take subsidiarity seriously? Professor Vischer is wary of a spineless subsidiarity:

> Standing alone, subsidiarity can be read simply as calling for social problems to be addressed at the local level to the extent local bodies can address a given problem effectively. Understood as a strictly political principle, the only grounds for dispute will be over the normative definition and empirical verification of effectiveness. Beyond that, the doctrine seems so broadly stated as to be of nearly universal appeal.[120]

With this observation, I agree—but, of course, subsidiarity never does "stand alone," at least it does not in the eyes of traditional Catholic social thought. Professor Vischer is right to warn that, "shorn from its surrounding web of truth claims," subsidiarity will be "vulnerabl[e] to secular domestication."[121] But what is this surrounding web of truth claims of which Vischer speaks? Does it contain *munera*? Participated shares in the divine rule?

On Vischer's account, subsidiarity is "doubly subversive: [first,] it subverts the state's efforts to collectivize individualist norms,"[122] as Garnett observed. Second, according to Vischer, "it also may subvert religious voices' efforts to collectivize norms grounded in the moral anthropology."[123] Professor Vischer continues: "[F]or subsidiarity to continue facilitating the common good as conceived of by Catholic social teaching, society must be persuaded to make room for multiple conceptions of the good, not simply seek to collectivize the Church's anthropologically authentic conception."[124]

If the point being made were that there exist today prudential reasons for tolerating in civil society the implementation of conceptions of the good for man that diverge from those taught by the Catholic magisterium, I should have to agree. But that is not Professor Vischer's point. "Substantively," according to Professor Vischer, "subsidiarity looks for power to be

---

[119] MESSNER, *supra* note 68, at 135; *see* Hittinger, *Social Pluralism*, *supra* note 8, at 55–58.

[120] Vischer, *Subversion*, *supra* note 118, at 277.

[121] *Id.* at 278.

[122] *Id.* at 279.

[123] *Id.*

[124] *Id.* at 278.

exercised . . . with the ultimate aim . . . of furthering authentic human development."[125] That is as committal as I have found Vischer to be in print; one looks in vain for *munera*, the given functions of group persons, in Professor Vischer's social ontology. Furthermore, instead of identifying and, as needed, assisting the authority that attends the proper discharge of a *munus*, subsidiarity in Professor Vischer's hands is made to stand against implementing, from the ground up, the common good as Catholics understand it:

> If we claim that subsidiarity renders localization in a particular context valid only to the extent that the local body's approach contributes to the common good, as defined by the truth claims of the moral anthropology [of the Church], we have emptied subsidiarity of its real-world meaning. If localization's validity is measured against a standard derived from a contested vision of the good, subsidiarity becomes a simple prop, justifying whatever vision of the good happens to hold sway in the political and legal spheres.[126]

As understood in the tradition of Catholic social thought, subsidiarity is not a principle that justifies subversion of claims on behalf of universal truths about the good for human and group persons. Magisterial Catholic social thought affirms plural societies and their respective authorities, and it does this on the ground that each possesses a *munus proprium*, a share in the divine rule, which, as the ontological principle subsidiarity attests, is irreducibly its own in concert with other genuine societies. Though it must be admitted that Catholic authors as well as others have said all manner of things about what subsidiarity amounts to, I read the Roman documents without finding a hint that subsidiarity is a principle of "value pluralism."[127] The pluralism that *is* implicated and affirmed by subsidiarity is a plurality of *authorities*, and authority for its

---

[125] *Id.* at 279.

[126] *Id.* at 309 (alteration in original). Which is not to deny, of course, that the Church affirms that concrete instantiation of the good can take myriad forms.

[127] *Id.* at 306. A less than precise application of the principle of subsidiary function occurs in the generally excellent *The Catholic School on the Threshold of the Third Millennium*: "A correct relationship between state and school, not only a Catholic school, is based not so much on institutional relations as on the right of each person to receive a suitable education of their free choice. This right is acknowledged according to the principle of subsidiarity." Congregation for Catholic Education, *The Catholic School on the Threshold of the Third Millennium*, L'OSSERVATORE ROMANO, Apr. 22, 1998, ¶ 17.

part, is discoverable in a particular society exactly to the extent that it is ordained immediately to its own good and mediately to the common good. Any genuine authority is a share in divine providence, and the legitimacy of its exercise depends upon its being ordered to the good of individuals, group persons, and the common good. In the words of the *Catechism*, which I quoted above:

> God has not willed to reserve to himself all exercise of power. He entrusts to every creature the functions [*munera*] it is capable of performing, according to the capacities of its own nature. This mode of governance ought to be followed in social life. The way God acts in governing the world, which bears witness to such great regard for human freedom, should inspire the wisdom of those who govern human communities. They should behave as ministers of divine providence.[128]

Or as St. Thomas says, the human person participates in the divine governance in a particularly excellent way, being provident for himself, and this includes the opportunity and exigence to order all human living to the good, including the common good, and ultimately the separate common good that is God.[129] Circumstances will dictate what is possible, but no principle of Catholic thought—and certainly not subsidiarity—carves out pockets of lawlessness in the name of "value pluralism."

V. MAKING WAY FOR THE LASALLIAN MISSION

How many American Catholics would be willing to affirm that "[s]ince it is the parents who have given life to their children, on them lies the gravest obligation of educating their family"?[130] The quoted language comes from the Second Vatican Council, but many Catholics are more likely to call it Amish than they are to own it. Many older Catholics will remember, of course, that Catholics are supposed to see that their children go to Catholic schools, but by now most Catholics seem to be, like the rest of the population, ready to eat meat on Fridays and let "the state" government do what it will with its schools and their children—so long, that is, as parents lucky enough to be able to afford religious (or other) schools can "opt out." Though we

[128] CATECHISM, *supra* note 59, ¶ 1884 (alteration in original).
[129] *SUMMA THEOLOGIAE*, *supra* note 69, pt. I–II, Q. 91, art. 2, at 997.
[130] *GRAVISSIMUM EDUCATIONIS*, *supra* note 100, ¶ 3.

manage episodic (if temperate) outrage at the current state of affairs, most Americans, including Catholics, seem to be largely comfortable with the reality that parents who are unlucky enough to be poor or low-income have no "choice" but the local public schools, even though those schools frequently are—and there can be no serious dispute about the relevant facts—abysmal. Poor parents are denied the practical opportunity to meet this "gravest obligation," yet protest is hardly heard. While rich parents go on choosing their children's education (whether it be at Sidwell Friends, say, or Portsmouth Abbey), poor and low-income parents have no "choice" but to watch their children be conscripted by failing public schools. According to the Second Vatican Council,

> All people of whatever race, condition or age, in virtue of their dignity as human persons, have an inalienable right to education. This education should be suitable to the particular destiny of the individuals, adapted to their ability, sex and national cultural traditions . . . . True education aims to give people a formation which is directed towards their final end and the good of that society to which they belong and in which, as adults, they will have their share of duties to perform .[131]

Is this right to a true education no part of the American Catholic consciousness? Why can American Catholics not come together in defense of the *munus* of the family and the correlative principle of subsidiarity as the criteria governing authentic parental choice over how, where, and by whom their children are to be educated? Judged against the right and duty of all families to be the primary providers of an education shaped by the parents according to their view of the final end, and against the right of all children to receive such an education, the American educational system and state of affairs deserve a failing grade. Period. Except to say that acquiescence in this moral abdication is a scandal that goes scandalously unrecognized.

"Education is the process and vocation of shaping souls."[132]

---

[131] *Id.* ¶ 1.

[132] Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1882 (2001); *see also* Michael Scaperlanda, *Realism, Freedom, and the Integral Development of the Human Person: A Catholic View of Education*, 44 J. CATH. LEGAL STUD. 65, 76 (2005) ("[T]he Catholic Church envisions a dynamic interplay among the parents, religious institutions, and the state in providing each child with an education. Each institution—i.e., family, Church, and state—has its own unique and complementary

The work La Salle and his Institute made their own was made necessary by poor families' structural inability to meet their vocation to their children. Saint La Salle described the Brothers' work as "one of the most important and most necessary services in the church, one entrusted to [them] by pastors and by fathers and mothers."[133] Their "holy ministry," La Salle taught his Brothers, is nothing less than to "*fulfill the function of guardian angels*" for the children entrusted to them.[134] "You share in the ministry of the guardian angels by making known to children the truths of the gospel, which God has chosen you to announce . . . . This is why Jesus Christ has sent you and why the church, whose ministers you are, employs you."[135] Those whom "God has entrusted . . . with so holy a ministry . . . he will summon . . . for a very exact account on the day of judgment."[136]

Eliminating the systemic injustice in the American educational apparatus requires realigning and harmonizing, for the first time in a long time in the American experiment, the societies that are Church, family, and school, and putting the state to work for those societies and the persons whom they nurture. Nearly all the relevant cultural vectors are headed in the wrong direction, and their magnitude is growing. The idea that above all leads, when acted upon, to a systemic stifling of the Lasallian initiative—or, more broadly, to poor parents' opportunity to fulfill their educational duty to their children—is the idea that rightful authority comes from the state down, rather from creation and redemption to individuals and specific societies as shares in the divine ruling power. The cultural situation we confront has more in common with La Salle's world than first meets the eye. La Salle knew, and we are reminded in the *Compendium of the Social Doctrine of the Church*, that society is built properly when it is "*built on a family scale*."[137] Righting the educational injustice in our nation requires giving effect to a principle that is terribly out of tune with our globalizing, homogenizing, straitening tendencies: Plural societies—plural group persons—possessed of their respective

role to play in the formation of the child.").

[133] KOCH, *supra* note 36, at 53.

[134] *Id.* at 47.

[135] *Id.* at 51, 55.

[136] *Id.* at 49–50.

[137] COMPENDIUM, *supra* note 59, ¶ 213.

munera are to be given *subsidium*, both the respect they deserve and what help they require.